In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-751

JOHN P. RUBEO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Following a jury trial in the United States District Court for the Southern District of New York, petitioner and co-defendant Accurso were convicted of transporting stolen money and racetrack tickets in interstate commerce knowing the property to be stolen (18 U.S.C. 2314) and of conspiring to commit the offense (18 U.S.C. 371). Petitioner was sentenced to concurrent terms of three and one-half years' imprisonment.

The evidence at trial showed that in March 1971 petitioner, Accurso, and a third co-defendant, Wie-

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land,[1] agreed to rob Samuel Lapides. They followed him in petitioner's car from a New York racetrack to a highway service area in Darien, Connecticut, where they robbed him of $3,700 in cash and $5,400 worth of winning racetrack tickets. Accurso and Wieland then forced Lapides to drive with them in Lapides' car to Yonkers, New York, while petitioner followed in his car. The three left Lapides in Yonkers and went to a restaurant where they divided the money (Tr. 31–36, 138–140, 196, 201–203).

1. Petitioner contends (Pet. 6–11) that the district court erred in admitting testimony relating to another robbery of Lapides about two weeks earlier by the same three men. This earlier robbery, which netted $5,100 in cash, followed several earlier unsuccessful efforts by the men to follow Lapides home from a New York racetrack (Tr. 18–28, 40–43, 86–88, 135–137).

It has long been settled that evidence of other crimes, though inadmissible to show the accused's character or criminal disposition, is properly received when offered to show an element of the crime charged or to corroborate other direct evidence, and when its probative value outweighs its prejudicial effect. See *Jones* v. *United States*, 258 U.S. 40, 48; *Nye & Nissen* v. *United States*, 336 U.S. 613, 618; *Spencer* v. *Texas*, 385 U.S. 554, 560–561. See, also, Rules 403 and 404(b)

[1] Wieland pleaded guilty to the transportation of stolen money and racetrack tickets and testified on behalf of the government.

of the new Federal Rules of Evidence.[2] The evidence here was properly admitted to show a continuing plan to victimize Lapides, to corroborate the existence of the conspiracy, to show the defendants' opportunity to commit the crime charged (*i.e.*, their knowledge of Lapides' habits and whereabouts), and to show the basis of Lapides' identification of Accurso as one of the robbers.[3]

2. Petitioner next contends (Pet. 11–12) that the district court's instructions (Tr. 329–331) on circumstantial evidence amounted to an improper comment on the evidence.[4] The judge explained that a friend of his had gone to the second Joe Louis-Max Schmel-

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[2] Rule 404(b) provides:

> *Other crimes, wrongs, or acts.*—Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. This subdivision does not exclude the evidence when offered for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Rule 403 states the general rule for the exclusion of prejudicial evidence:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

[3] The fact that the first robbery involved no interstate transportation and therefore was not a federal offense does not affect the admissibility of evidence concerning it in a federal court. See, *e.g.*, *United States* v. *Feinberg*, 383 F. 2d 60, 71 (C.A. 2), certiorari denied, 389 U.S. 1044.

[4] We have set forth in an Appendix hereto the entire instruction about which petitioner complains.

ing prize fight, and had been turning around to take his seat when the knockout occurred. Although he had not seen the punch, he could rely on the circumstantial evidence of the crowd's reaction and the fighters' demeanor in concluding that Louis had knocked out Schmeling and in discounting other possible theories for Schmeling's prone position in the ring, such as that he had been shot by a man in the balcony.

The judge then stated that petitioner's possession of the stolen racetrack tickets was circumstantial evidence. The government's position, he said, was that the fighter had been knocked out; the defendant's position was that the fighter may have been shot by someone in the balcony.[5]

The trial judge's right to comment on the evidence is limited by his duty to instruct the jury that they are the sole judges of the facts and are free to reach their own conclusions. See *United States* v. *Lee*, 422 F. 2d 1049, 1052 (C.A. 5). See, also, Rule 105 of the new Federal Rules of Evidence.[6] Here, the court in-

[5] During cross-examination of Lapides, defense counsel questioned him concerning the possibility that he had lost the tickets prior to the robbery (Tr. 189–190). Petitioner's counsel suggested in summation that Lapides had in fact lost the tickets (Tr. 281).

[6] The rule provides:

> After the close of the evidence and arguments of counsel, the judge may fairly and impartially sum up the evidence and comment to the jury upon the weight of the evidence and the credibility of the witnesses, if he also instructs the jury that they are to determine for themselves the weight of the evidence and the credit to be given to the witnesses and that they are not bound by the judge's summation or comment.

structed the jury at the outset that they, not the attorneys or the court, were the sole judges of the facts and of the credibility of witnesses (Tr. 321). The court repeated that instruction immediately after the remarks of which petitioner complains (Tr. 331). Thus, even if the court's remarks are considered a comment on the evidence indicating disbelief in the defense theory as to how petitioner had come into possession of the racetrack tickets, the comment was properly made in the context of clear instructions as to the jury's province. The remarks did not constitute a direction to the jury to find petitioner guilty. Compare *Quercia* v. *United States,* 289 U.S. 466.

3. Petitioner argues (Pet. 12, A3–A6) that a pretrial photographic identification procedure was impermissibly suggestive and tainted Lapides' in-court identification of co-defendant Accurso.[7] Lapides testified out of the jury's presence that eight days after the second robbery he was shown ten photographs of "possible suspects" and that he pointed to Accurso as a person involved in both robberies (Tr. 117–120). Although Lapides had told investigators that the robber wore eyeglasses, only Accurso's photograph showed a person wearing eyeglasses. Lapides stated, however, that this factor did not influence his selection of Accurso's photograph (Tr. 121–123).

[7] Petitioner contends also that Lapides was erroneously permitted to testify concerning the photographic identification (Pet. A3). In fact, however, the only testimony concerning the photographs was during a hearing out of the presence of the jury (Tr. 117–138).

Moreover, Lapides testified that his in-court identification of Accurso, made a year after the photographic identification, was based on his recollection of the robber and not of the photographs (Tr. 131). Lapides had an ample opportunity to view Accurso on the occasion of each robbery (Tr. 137–138, 155–156, 187). He was positive in his in-court identification of Accurso as one of the robbers. Apart from the question whether petitioner has standing to object to the identification of Accurso, the identification here was not so impermissibly suggestive as to create a substantial likelihood of irreparable misidentification. *Simmons* v. *United States,* 390 U.S. 377, 384.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

JANUARY 1973.

APPENDIX

The instructions of the district court provided in pertinent part:

> But let me explain to you, for example, how circumstantial evidence works, with an incident:
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> At one time I played football with the New York Giants, and we were given tickets to go and see a fight between Schmeling and Louis. Mr. Schmeling had beaten Joe Louis the first time around. He felt terrible about it. The rematch came along.
>
> Now, this fellow that I knew had bought one of these tickets for $100, quite an amount of money in those days, back about thirty years. And so he started off with this fight, the second Joe Louis-Schmeling fight, and went up to the Garden, a tremendous crowd, blocks around. He got there just about the time that the main fight was starting, and as he went along to get his seat, which was a good seat, three or four rows back from ringside, the fighters had been introduced in the ring and the referee was in the ring. He started to go into the seats behind the people in front of him. And all of a sudden everybody jumped up. The fight had started, the gong had clanged, and lo and behold, before he could even turn around or even look up or see anything, the fight was over. Joe Louis had beaten this fellow in thirteen seconds, I think it was.
>
> Could that fellow tell you that Schmeling was knocked out by Joe Louis? He didn't see it. People in the seats in front jumped up. He saw nothing. But then when he did get up he

saw Schmeling prone on the ring, he saw Joe Louis with a great grin on his face and his hands drawn up in the traditional position of a winner by the referee. Do you think if you asked him that night did he know whether Joe Louis beat Schmeling that he could tell you?

He was only relying on circumstantial evidence. He didn't see it. It could be dreamed up that some fellow up in the upper tiers of Madison Square Garden, which I could even see now, way up, 200 yards maybe away, with a high-powered rifle, with a telescopic lens, could have killed Schmeling and killed him in that fashion and had him lying prone on the canvas. Somebody could have put cyanide in his drink and killed him that way so that he was prone. There are many things that could have happened.

But do you think that an ordinary person asking that man what happened to Schmeling that night, that he couldn't say to them, based on what I know about this, the circumstantial evidence that I know, he was knocked out by Joe Louis. Yes, but he could have been shot by a guy up in the upper tiers. Well, he could have been, sure. But circumstantial evidence works that way and that's the way you use it

every day of your life. You go down, you wait for the subway. You didn't see the train leave the Bronx to come down here or come up from Brooklyn. But you have done things over the course of years and certain things happened and if you know that if you do those things, other things will happen, and that is the way circumstantial evidence works and that's the way you should apply it to this case.

These tickets, for example, are only circumstantial evidence, and as far as the Rubeo part of it is concerned, the explanation of his that he gave them to his father and his father went and gave it to the brother-in-law or the son-in-law, as it be, and he went and tried to cash them, well, the Government has taken one position on that; they say Joe Louis was knocked out. The defendants say, oh, wait a minute, it could have been a guy up in the audience with a telescope. You make your own judgment on that. You come to your own conclusion.

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